Supreme Court, U.S.
FILED

(1)

No. 95-563 OCT 5 - 1995

OFFICE OF THE CLERK

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

---

CONSTRUCTION AND LABORER'S UNION LOCAL NO. 324,
JESSE THOMAS, JESSE DURRAN, JR.,
JESSE DURRAN, SR., and CHARLES EVANS,
*Petitioners,*

v.

DOUGLAS MURRAY,
*Respondent.*

---

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

---

SANDRA RAE BENSON
*Counsel of Record*
VICTOR J. VAN BOURG
VAN BOURG, WEINBERG, ROGER
& ROSENFELD
A Professional Corporation
180 Grand Avenue, Suite 1400
Oakland, California 94612
(510) 839-6600

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

94 pp

## QUESTIONS PRESENTED

1. Did the district court's removal of a known solitary hold-out juror late in the deliberations of an apparently hung jury in order to avoid a half-day delay in deliberations deprive petitioners of their right to a unanimous verdict under the Seventh Amendment and Fed. Rule Civ. Pro 48?

2. Did the award and cursory affirmance of punitive damages nearly 800 times greater than the actual damages deprive petitioners of their right to substantive due process and contravene national labor policy enunciated by this court disfavoring the imposition of punitive damages against unions?

3. Did the courts below create an irreconcilable conflict between a union's duties under the National Labor Relations Act and the Labor Management Reporting and Disclosure Act (LMRDA) by basing an LMRDA violation on conduct required by the collective bargaining agreement and the NLRA?

## LIST OF PARTIES

The parties to the proceedings below, and before this court are:

1. Construction and Laborers Union Local 324
2. Jesse Thomas
3. Jesse Durran, Jr.
4. Charles Evans
5. Bob Davis
6. Douglas Murray

The following was a party to the proceedings below but is now deceased:

7. Jesse Durran, Sr.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| LIST OF PARTIES | ii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTES INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 11 |
| I. THE NINTH CIRCUIT'S DETERMINATION THAT THE REMOVAL OF A KNOWN HOLD-OUT JUROR DURING DELIBERATIONS AT A TIME WHEN THE JURY WAS HUNG WAS NOT AN ABUSE OF DISCRETION CONFLICTS WITH DECISIONS OF THE OTHER FEDERAL CIRCUITS AND VIOLATED DEFENDANTS' CONSTITUTIONAL AND FEDERAL STATUTORY RIGHT TO A UNANIMOUS VERDICT | 11 |
| II. THE JURY'S IMPOSITION OF PUNITIVE DAMAGES AMOUNTING TO NEARY 800 TIMES THE COMPENSATORY DAMAGE AWARD AND THE CURSORY REVIEW OF THAT AWARD BY THE TRIAL COURT AND COURT OF APPEALS VIOLATED PETITIONERS' RIGHT TO SUBSTANTIVE DUE PROCESS UNDER THE FIFTH AMENDMENT AND CONTRAVENED THIS COURT'S ENUNCIATION OF THE NATIONAL LABOR POLICY AGAINST WEAKENING UNIONS AND PENALIZING DUES-CONTRIBUTING MEMBERS FOR ALLEGED UNION MISCONDUCT | 17 |

TABLE OF CONTENTS—Continued

Page

III. THE NINTH CIRCUIT HAS CREATED AN IRRECONCILABLE CONFLICT OF STATUTORY DUTIES FOR PETITIONER AND OTHER UNIONS BY AFFIRMING THE SUBMISSION TO THE JURY FOR CONSIDERATION AS AN LMRDA VIOLATION CONDUCT THAT WAS REQUIRED OF THE UNION BY THE NATIONAL LABOR RELATIONS ACT IN ORDER TO AVOID VIOLATING THE DUTY OF FAIR REPRESENTATION OWED TO OTHER UNION MEMBERS ..... 25

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

CASES — Page

*Achilli v. United States*, 353 U.S. 373 (1957) ..... 30
*American Publishing Co. v. Fisher*, 166 U.S. 464 (1897) ..... 11
*Andres v. United States*, 333 U.S. 740 (1947) ..... 11
*Breininger v. Sheet Metal Workers Int'l Assn., Local Union No. 6*, 493 U.S. 67 (1989) ..... 26
*Dole v. United Steelworkers of America*, 494 U.S. 26 (1990) ..... 30
*Dunn v. Hovic*, 1 F.3d 1371 (3d Cir. 1993) ..... 19
*Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991) ..... 20
*Green v. Zant*, 715 F.2d 551 (11th Cir. 1983) ..... 12
*Honda Motor Co. v. Oberg*, 512 U.S. ——, 129 L. Ed. 2d 336 (1994) ..... 18, 19, 20
*International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979) ..... *passim*
*Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991) ..... 20
*Johnson v. Louisiana*, 406 U.S. 356 (1972) ..... 11
*Klein v. Grynberg*, 44 F.3d 1497 (10th Cir. 1995) .. 20
*Kokoszka v. Belford*, 417 U.S. 642 (1974) ..... 29
*Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) ..... 30
*Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993), *cert. dismissed, sub nom., Searle v. Morgan*, —— U.S. ——, 126 L.Ed.2d 640 (1994) ..... 9
*Murray v. Laborers Union Local No. 324, et al.*, Nos. 93-15641, 93-16176, 93-16540, slip op. 8401 (9th Cir. July 14, 1995) ..... 9, 10, 28
*NLRB v. Iron Workers Local 75*, 583 F.2d 1094 (9th Cir. 1978) ..... 26, 29
*Paramount Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991) ..... 9, 18, 20, 21
*Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 128 L.Ed.2d 677 (1994) ..... 20
*Searle v. Morgan*, —— U.S. ——, 126 L.Ed.2d 640 (1994) ..... 9

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Southwestern Telegraph and Telephone Co. v. Danaher*, 238 U.S. 483 (1914) | 23 |
| *TXO Production v. Alliance Resources*, —— U.S. ——, 125 L.Ed.2d 366 (1993) | *passim* |
| *United Paperworkers v. Misco*, 484 U.S. 29 (1987) | 27, 28 |
| *United States v. Essex*, 734 F.2d 832 (1984) | 12 |
| *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987) | 12 |
| *United States v. Hernandez*, 862 F.2d 17 (2nd Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989) | 12 |
| *United States v. Lopez*, 581 U.S. 1338 (9th Cir. 1978) | 14 |
| *United States v. Tabacca*, 924 F.2d 906 (9th Cir. 1991) | 9, 12, 13, 14 |
| *United States v. Wilson*, 894 F.2d 1245 (11th Cir. 1990), *cert. denied*, 497 U.S. 1029 (1990) | 12 |
| *Vaca v. Sipes*, 386 U.S. 171 (1967) | 25 |
| **CONSTITUTIONS** | |
| U.S. Constitution | |
| Art. III, § 2 | 16 |
| Amdt 6 | 16 |
| Amdt 7 | 16 |
| **FEDERAL STATUTES** | |
| 28 U.S.C. § 1254(1) | 1 |
| 28 U.S.C. § 2101(c) | 1 |
| 28 U.S.C. §§ 1331 and 1337 | 2 |
| The National Labor Relations Act (NLRA), 29 U.S.C. § 151, et seq. | |
| NLRA § 8(b)(1), 29 U.S.C. § 158(b)(1) | 2, 26 |
| NLRA § 8(b)(2), 29 U.S.C. § 158(b)(2) | 2, 26 |
| NLRA § 9(a), 29 U.S.C. § 159(a) | 2 |
| The Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401, et seq. | 4 |
| LMRDA § 3(a), 29 U.S.C. § 402(i) | 2 |
| LMRDA § 101, 29 U.S.C. § 411 | 3, 25, 26 |
| LMRDA § 102, 29 U.S.C. § 412 | 2, 23, 26, 28 |
| LMRDA § 609, 29 U.S.C. § 529 | 3, 25, 26 |

TABLE OF AUTHORITIES—Continued

Page

The Labor Management Relations Act of 1947, 29 U.S.C. § 173(d) ..... 27

RULES

U.S. Sup. Ct. Rule 13.4 ..... 1
Fed. Rule Civ. Pro. 47(c) ..... 11, 16
Fed. Rule Civ. Pro. 48 ..... 11

TEXTS

Hastie, Penrod, and Pennington, *Inside the Jury* (1987) ..... 14, 15
Charlan Nemeth, *Interactions between Jurors as a Function of Majority v. Unanimity Decision Rules*, 7 *Journal of Applied Social Psychology*, 38-56 ..... 14, 15
Charles Hawkins, *Interaction Rates Among Jurors Aligned in Factions*, 27 *American Sociological Review* 689-91 (1962) ..... 15

## PETITION FOR A WRIT OF CERTIORARI

Laborers Union Local No. 324 ("the Union"), Jesse Thomas, Jesse Durran, Jr., Charles Evans, and Bob Davis respectfully pray that a Writ of Certiorari issue to review a portion of the Amended Order and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 14, 1995. The original Opinion and Order were entered on May 31, 1995. A Petition for Rehearing was denied, and a Suggestion for Rehearing *En Banc* was rejected by the Ninth Circuit on July 14, 1995, the same day the Opinion and Order were amended.

### OPINIONS BELOW

The Order and Opinion of the United States Court of Appeals for the Ninth Circuit filed May 31, 1995 and amended July 14, 1995, is reported at slip op. 8401 and reprinted at App. A, p. 1a, *infra.* The Judgment of the United States District Court for the Northern District of California is not published and is reprinted at App. B, p. 21a, *infra.* The jury's verdict is reprinted at App. C, p. 23a, *infra.* The other Orders of the United States District Court and the Ninth Circuit are unpublished and reprinted at Apps. D-G, pp. 26a-30a, *infra.*

### JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on May 31, 1995 and was amended on July 14, 1995. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed on June 13, 1995. On July 14, 1995, the Ninth Circuit denied the Petition for Rehearing, and rejected the Suggestion for Rehearing *En Banc.* The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c) and U.S. Sup. Ct. Rule 13.4

### STATUTES INVOLVED

The relevant statutory provisions are:

A. National Labor Relations Act, as amended, §§ 8(b)(1) and (2) and § 9(a), 29 U.S.C. § 158 (b)(1) and (2) and § 159(a).

B. The Labor Management Reporting and Disclosure Act, §§ 101, 102, and 609, 29 U.S.C. §§ 411, 412, and 529.

Pertinent portions of these statutory provisions are reproduced at Appendix H, p. 31a, *infra*.

## STATEMENT OF THE CASE

This case presents the Court with three important issues for review: (1) the constitutional limit on a judge's discretion to dismiss a juror who has become an obstacle to a unanimous verdict for reasons that amount to minor concerns for the court's calendar; (2) the constitutionality of a punitive damages award against a labor union nearly 800 times greater than actual damages; and (3) the intractable contradiction between a union's obligations under the National Labor Relations Act, 29 U.S.C. §§ 158(b)(1) and (2) and 159(a) and the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411, created by the decisions of the courts below.

Jurisdiction of the district court was invoked pursuant to 29 U.S.C. § 412 and 28 U.S.C. §§ 1331 and 1337. Local 324 is a labor union within the meaning of § 2(5) of the National Labor Relations Act (NLRA), 29 U.S.C. § 152(5), and § 3(a) of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 402(i).

This case arises from a dispute between Respondent Murray, a self-styled dissident member of Local 324, and several of the Union's officers and members. The dispute erupted in several boisterous confrontations and later claims by Murray that the Union had deprived him of a job referral to which he was entitled. Murray filed a complaint alleging that Petitioners Local 324, Jesse Thomas (the Union's president), Charles Evans (its busines manager and secretary-treasurer), Bob Davis (its recording secretary), and Jesse Durran, Jr. (a Union business representative), had violated LMRDA § 102 by infringing on Murray's rights to free speech and participation in union activities; that Local 324, Thomas, Evans, Davis, Durran, Jr., and Jesse Durran, Sr. (a former union mem-

ber, now deceased) had "committed, encouraged or actively participated in" a common law assault on Murray; that Local 324 had violated the duty of fair representation in several instances; and that, by obtaining an assessment of costs for an arbitration against Murray and by using pre-paid dues to collect that assessment, Local 324 had imposed a "fine or other discipline" without due process and in retaliation for protected activity in violation of LMRDA §§ 101(a)(5) and 609.

After a three and a half day trial, the district court granted judgment for Petitioners as a matter of law on the common-law assault claims against Local 324, Evans, and Davis; the duty of fair representation claims; and the § 101(a)(5) and 609 claims. Only the § 102 claims and the assault claims against Durran, Jr. and Durran, Sr. went to the jury. (ER 167-178). On most of these claims, Murray prevailed and was awarded $100.00 compensatory damages and $77,500 in punitive damages against defendants Local 324, Thomas, Durran, Jr., and Evans for violation of LMRDA § 102. Of the punitive damages, the jury allocated $50,000 against the union, $10,000 against Thomas, $10,000 against Durran, Jr. and $7,500 against Evans. The jury found that Durran, Jr. had not assaulted Murray, but that Durran, Sr. had, and awarded Murray $100 in compensatory damages.

Petitioners now seek this Court's review of three critical errors committed by the trial court and Ninth Circuit. First, the district court removed a known holdout juror during deliberations by a jury known by the court to be hung. Second, the district court and Ninth Circuit summarily affirmed the jury's imposition of punitive damages amounting to nearly 800 times the compensatory damage award for a claimed violation of the Labor-Management Reporting and Disclosure Act, without principled analysis of the substantive due process and national labor policy issues raised by the jury's award. Third, the district court allowed the jury to impose liability on Petitioners under the LMRDA for conduct required by its duty to fairly

represent other union members under the National Labor Relations Act, 29 U.S.C. §§ 141-197 (1988).[1]

After two days of deliberations and after having been apprised by a sequence of three notes that the jury was hung, the court removed one of the jurors, Mr. Giancoli. The court was on constructive notice that juror Giancoli was the only holdout on an otherwise unified jury. (ER 200-202; the jurors' notes are reprinted at App. I, p. 36a, *infra*). The first note indicated the jury could not reach a unanimous verdict and had scheduling conflicts. The second note, *from Giancoli alone*, stated that "the jury is *hopelessly* divided" (emphasis added). Fifteen minutes later, the other seven jurors signed a note, with Giancolis' signature conspicuously absent, indicating they believed they were close to a verdict and wanted to continue deliberations, thereby communicating that removal of Giancoli to resolve the scheduling conflict would also bring a speedy verdict. (ER 200-202; jurors' notes reprinted at App. I, 36a, *infra*). Despite clear indications that Giancoli was a lone holdout and notwithstanding defense counsel's objection to his removal on the ground that it could cause a mistrial and violate the right of the losing party to a unanimous verdict (ER 206), the judge removed the juror. The judge explained that Giancoli

---

[1] Respondent's LMRDA claim rested on the assertion that Local 324 violated his rights by failing to dispatch him to a job through the hiring hall when union officials learned of the existence of a letter by an employer requesting him by name. Respondent was in a residential training program at the time, so was not present in the hiring hall and never collected the employer's letter or presented it to the Union, as required by the terms of the hiring hall provisions of the collective bargaining agreement. An arbitrator ruled that the union was prohibited from dispatching respondent under the circumstances because doing so would violate the duty of fair representation owed to the other union members who had complied with the hiring hall procedures. The National Labor Relations Board refused to issue a complaint in Respondent's subsequent unfair practice claim. Nevertheless, the district court allowed the jury to impose liability on the union under LMRDA § 102 for failing to dispatch Respondent, placing the union in an untenable conflict of statutory duties.

had to be excused to attend a half day previously-scheduled board of directors meeting.

Giancoli neither requested nor wished to be removed. (ER 230) He was neither ill nor suffering any physical or mental infirmity that would have interfered with his ability to complete his duties as a juror after a half-day's absence. He faced no family emergency. The only reason proffered for his dismissal was his need for a brief recess of the deliberations. When speaking to Giancoli after his dismissal, the judge stated, "I understand this is not the happiest of circumstances. There's no hung-jury or nearly hung jury that's a happy jury," Defense counsel asked the court to remind the jury they could seek clarification of any confusing issues and allow them to continue deliberations until Giancoli was forced to leave for his meeting, yet the judge dismissed Giancoli an hour and a half before he needed to leave. (ER 205-210; an excerpt of the record containing counsel's arguments is reprinted App. J, p. 40a, *infra.*)

In contrast to Ginacoli's swift dismissal, the court accommodated other jurors with scheduling conflicts. On the second day of deliberations, the jury was unable to deliberate in the afternoon because juror Bowers had to attend a job interview. Bowers was not dismissed. On the same day that juror Giancoli had to attend his afternoon meeting, juror DeWolke had to leave at 4:00 p.m. and juror Maagedenberg had to leave at 4:30 p.m., but the judge let both of them remain on the panel. Juror Giancoli, the lone holdout, was the only juror singled out for removal.

Once Giancoli was removed, the previously deadlocked jury returned a verdict in less than an hour. It found Durran, Jr. had not assaulted Murray, but that Local 324, Durran, Jr., Thomas, and Evans were liable for violating Murray's "free speech rights under the Labor-Management Reporting and Disclosure Act" and rendered a compensatory award of $100.00. It then imposed puntive damages totalling $77,500.00, nearly 800

times the compensatory award. $10,000.00 of the punitive damages were assessed against Durran, Jr. alone.

The punitive damages award was premised upon conduct found by an arbitrator to be required of the union by the governing collective bargaining agreement. Local 324 represents construction laborers whose terms and conditions of employment are governed by a collective bargaining agreement known as the Laborers Master Agreement for Northern California. That agreement sets forth a written hiring hall procedure under which Union members are assigned work in order of the placement of their names on an "out of work" board. Placement on the board is determined by the order in which members register for work. As members are dispatched to jobs, names of those remaining out of work move up on the board. To obtain a dispatch, employees must be "available for employment," meaning present in the hiring hall, according to the contractual provisions. The agreement allows deviation from the strict chronological sequence of dispatch if an employer requests a specific employee. However, severe restrictions are placed on that practice because it results in the denial of a job to the person at the top of the list, who has patiently waited for work in accord with a fair and orderly process.

Murray solicited such an employment request from an employer but did not receive it immediately. He then entered an educational program at the Laborer's Training Center, which is run by an organization separate and apart from Local 324 for the purpose of training Laborers throughout Northern California. While Murray was in the training center, the employer issued several name-call request letters, one of which named Murray. The other employees so named either contacted or were contacted by the employer. Each picked up the letter request directly from the employer and presented it to the Union to receive a dispatch. Murray, however, never picked up his letter and was not "available for employment" within the meaning of the collective bargaining agreement because of his commitment to finishing the training program and his absence from the hiring hall. He, therefore, did not

learn of the letter, did not bring it to the Union, and was not dispatched to work for the employer.

When Murray later learned of the letter, he filed a "hiring hall grievance" pursuant to the collective bargaining agreement, alleging that Local 324 was required to notify him at the training center of the existence of the letter. The grievance proceeded to arbitration. The arbitrator found that, not only was the Union *not required* by the collective bargaining agreement to notify Murray of the letter by phone, it was *prohibited* from doing so. The arbitrator found that had the union issued a dispatch to Murray under the circumstances, it would have violated its duty of fair representation to other members waiting on the list who were actually entitled to the work in question under the provisions of the hiring hall agreement. (Arbitrator McKay's ruling is reprinted at App. K, p. 46a, *infra*). Unhappy with that ruling, Murray filed an unfair labor practice charge against the union with the National Labor Relations Board. The NLRB, however, dismissed Murray's charge. Despite the findings of the arbitrator and the deference by the NLRB, the court submitted the "failure to refer" issue to the jury for consideration as a violation of the LMRDA.

The second group of events claimed by Respondent to have resulted in a violation of his LMRDA rights centered on events in the hiring hall. Murray repeatedly disrupted activities there by distributing a newsletter in a manner members found aggressive and irritating. On one occasion, when Murray occupied one of the two available tables during hiring hall hours, Evans asked him to cease harassing the members and began to gather up the newsletter. Murray hurled profane epithets at Evans and eventually the police were called. The police refused to remove Murray because there was no posted rule prohibiting solicitation and distribution. Concerned about the disruption of the hiring hall, Local 324 promulgated a narrowly tailored "no solicitation, no distribution" rule, applicable only inside the hiring hall and only during hiring hall hours. Durran, Jr. informed Murray that the

rule would be enforced. Murray was still able to hand out his literature at Union meetings, in the Union's parking lots, at the entrances to the hiring hall, and to mail it to whomever he wished.

The third set of events relied on by Respondent took place at a regularly scheduled membership meeting in October 1989. At that meeting, Murray questioned the accuracy of the minutes of the previous meeting, which he had not attended. The minutes were, nevertheless, approved by membership vote. When the president, Thomas, moved on to the next item on the agenda, Murray successfully sought recognition from the chair and continued to challenge the accuracy of the minutes. Thomas ruled Murray out of order and repeatedly asked him to be seated. When Murray refused, Thomas exercised his authority under the governing procedural rules, codified in the Uniform Local Union Constitution, to "discipline members who improperly obstruct and interfere with the orderly conduct of the business of the meeting" and asked Murray to leave. When Murray persisted in his interruption, Thomas asked the Sergeant at Arms to escort Murray from the meeting. Murray resisted, and Thomas requested assistance for the Sergeant at Arms. Durran, Jr. reached for Murray's brief case and Murray attacked him. Durran, Sr. pulled Murray's hair. Eventually the scuffle subsided, and Murray remained through the rest of the meeting.

The jury determined that Durran, Jr. did not assault Murray. As Durran, Jr. was only alleged to have violated Murray's rights by assaulting him and by participating in the failure to refer Murray to the employer, the jury's $10,000 punitive damages award against Durran, Jr. can only be based on the jury's findings regarding the employer referral issue.

After the verdict, Petitioners moved for Judgment as a Matter of Law and for a new trial, arguing that removal of the juror was not for cause and violated defendants' right to a unanimous verdict, the evidence did not support the verdict, the punitive damages award was excessive in

violation of defendants' right to due process, and the submission of the employer referral issue to the jury was improper, as it placed the union in the untenable position of choosing between irreconcilable statutory duties.

The trial court denied the motions, finding that the juror was properly removed, the punitive damages award was constitutionally acceptable because free speech rights violations are "difficult to put a price tag on," and that the referral issue was properly sent to the jury as a basis for the LMRDA claim.

On appeal, the Ninth Circuit affirmed, *Murray*, slip op. at 8401 (9th Cir. July 14, 1995). In derogation of its own earlier decision in *United States v. Tabacca*, 924 F.2d 906 (9th Cir. 1991), and in conflict with the prevailing rule among the federal circuits, the court found removal of the juror was proper, despite the strong inference that the judge was aware of, and motivated by, the fact that Giancoli was a holdout. Originally, the Ninth Circuit did not address *Tabacca* at all. When the direct conflict between the two cases was called to its attention in the Petition for Rehearing, the court amended its opinion, distinguishing *Tabacca* on the grounds that the issues in this case were so complex that any further delay would "dull the juror's memories and concentration." *Murray*, slip op. at 8406. However, the material facts of *Tabacca* are nearly identical to those of this case.

The court also summarily affirmed the award of punitive damages. *Id.*, slip op. at 8417-18. Applying its decision in *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993), *cert. dismissed, sub nom. Searle v. Morgan*, 126 L.Ed.2d 640 (1994), the court determined that the due process concerns articulated by this court in *Paramount Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), were satisfied because (1) the judge adequately instructed the jury regarding the purpose of punitive damages; (2) the trial court adequately explained its reasons for upholding the verdict notwithstanding the disparity between the actual and punitive damage awards, namely that free-

dom of speech violations are "hard to put a price tag on;" and (3) the award was not unconstitutionally excessive because of "the seriousness of the infringement on Murray's freedom of speech." *Murray*, slip op. at 8418.

That fleeting reference to the "seriousness" of the "infringement" constituted the Ninth Circuit's entire analysis of whether the punitive damages award exceeded the amount necessary to accomplish the goals of punishment and deterrence. The appellate court provided no factual analysis addressing the factors articulated in *Haslip* and *TXO Production v. Alliance Resources*, —— U.S. ——, 125 L.Ed.2d 366 (1993), and enunciated no other factors serving a similar purpose. The court neglected to explain how it concluded that Murray's free speech rights were violated, much less how it determined that the violations were serious, what constitutes a "serious" violation, or how the policies underlying the imposition of punitive damages were served. The Ninth Circuit did not address counsel's argument that imposition of punitive damages in this context violated the national labor policy disfavoring punitive damage awards against unions, articulated by this Court in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979).

The court acknowledged that the failure to notify Murray of the employer letter and promulgation of the no-solicitation no-distribution rule might not be permissible bases for an LMRDA claim. *Murray*, slip op. at 8416. The court nevertheless held there was substantial evidence in the record to support the jury's finding of free speech violations by vaguely alluding to evidence regarding events at the membership meeting, attempted confiscation of the newsletters, and the use of Murray's prepaid dues to collect costs assessed against him in an arbitration he lost. Use of the dues was found by the trial court not to constitute a LMRDA violation because the costs were assessed by a neutral arbitrator after a full and fair hearing. *Id.* The court made no effort to determine what part of the jury's award rested on findings regarding the employer referral issue, and never resolved whether sending that issue to the jury was proper.

## REASONS FOR GRANTING THE WRIT

### I. THE NINTH CIRCUIT'S DETERMINATION THAT THE REMOVAL OF A KNOWN HOLDOUT JUROR DURING DELIBERATIONS AT A TIME WHEN THE JURY WAS HUNG WAS NOT AN ABUSE OF DISCRETION CONFLICTS WITH DECISIONS OF THE OTHER FEDERAL CIRCUITS AND VIOLATED DEFENDANTS' CONSTITUTIONAL AND FEDERAL STATUTORY RIGHT TO A UNANIMOUS VERDICT.

The Ninth Circuit's ruling in this case, upholding the removal of juror Giancoli despite evidence creating a strong inference that the trial court was motivated by an improper purpose to eliminate an obstacle to a quick verdict, is in direct conflict with the weight of authority in the other federal circuits that have passed on the issue.

It is well-settled law that litigants in civil cases in the federal courts have a constitutional right under the Seventh Amendment to a decision by a unanimous jury. *Andres v. United States,* 333 U.S. 740, 748 (1947); *Johnson v. Louisiana,* 406 U.S. 356, 370-71 (1972) (Powell concurring); *American Publishing Co. v. Fisher,* 166 U.S. 464, 467-68 (1897). F.R.C.P. 48 codifies that right. Absent a waiver by the defendant, which is lacking in this case, the right to a unanimous verdict must be preserved.

F.R.C.P. 47(c) provides that a court "may for good cause excuse a juror from service during trial or deliberation." The Committee Note to the amendment that added subsection (c) indicates that "sickness, family emergency or juror misconduct that might occasion a mistrial are examples of appropriate grounds for excusing a juror." The Note emphasizes, however, that good cause for dismissal does not include that a "juror refuses to join with fellow jurors in reaching a unanimous verdict." *Id.* The federal circuits that have addressed the juror discharge issue have been very careful to note that even a hint that a juror is a holdout against

an otherwise unanimous verdict precludes her dismissal. *United States v. Hernandez*, 862 F.2d 17, 23 (2nd Cir. 1988) *cert. denied*, 489 U.S. 1032 (1989); *United v. Essex*, 734 F.2d 832, 844 (1984); *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987); *United States v. Wilson*, 894 F.2d 1245, 1250 (11th Cir. 1990) *cert. denied*, 497 U.S. 1029 (1990); *Green v. Zant*, 715 F.2d 551, 556 (11th Cir. 1983).

In *Hernandez*, the trial court purported to remove a lone holdout juror for "just cause" under Fed Rule Crim Procedure 23(b), because the juror was mentally ill and disruptive. The Second Circuit reversed and remanded for a new trial because the judge was on notice the juror was a holdout and it was "not clear" from the record that the juror was removed for mental illness, rather than because he refused to join the majority. 862 F.2d at 23. The court stated, "That a juror may not be removed because he or she disagrees with the other jurors because of the merits of the case requires no citation. Moreover, removal of the sole holdout for acquittal is an issue at the heart of the trial process and must be meticulously scrutinized." *Id.* Other circuits are in accord.[2]

Reasoning similarly, the Ninth Circuit previously ruled in *United States v. Tabacca*, 924 F.2d 906 (9th Cir. 1991), that the trial court abused its discretion by removing a holdout juror because he was forced to miss one

---

[2] See, e.g., *Brown*, 823 F.2d at 596 ("a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the evidence"); *Essex*, 734 F.2d at 844 (defendant's right to a unanimous verdict violated because of *possibility* that absent juror was "a lone holdout" in the face of a "hostile pro-conviction majority"); *Wilson*, 894 F.2d at 1250 (upholding dismissal of ill juror because "the record does not present even the slightest basis to believe that this juror was a holdout juror or that the jury had reached any sort of impasse in its deliberations"); *Green v. Zant*, 715 F.2d at 556 ("Trial courts have discretion to dismiss ill jurors, but there is no discretion whatever to dismiss such a juror who is *not* in fact ill or otherwise incapacitated").

half day of deliberations due to a transportation problem. The court held that the additional half-day delay was "unlikely to induce dull memories on the part of the jurors," even though it followed a three-day weekend. *Id.* at 915. As with the current case, the trial was short (3.5 days here, 2.5 days in *Tabacca*) and the delay resulting from the juror's absence was not due to illness, mental or physical incapacity, or family emergency. The current case is distinguishable only because the delay caused by Giancoli's absence would not have followed a three-day weekend but, rather, would have resulted in less of a gap in deliberations than was permitted in *Tabacca*. *Tabacca* held that a temporary interruption in deliberations due to a transportation problem did not constitute just cause for removal. *Id.*

Despite the uncanny similarities between *Tabacca* and the instant case, and notwithstanding the authority throughout the federal appellate courts that any indication a juror is a holdout precludes removal, the Ninth Circuit reversed course in this case and ruled that the judge did not abuse his discretion my removing juror Giancoli. The sequence of notes from the jurors put the judge on notice that Giancoli was a lone holdout. Giancoli's note, signed by him alone, declared that the jury was "hopelessly divided." A mere fifteen minutes later, the remaining jurors, without Giancoli's signature, submitted a note indicating that they were close to a verdict and wanted to continue deliberations. See App. I, p. 36a, *infra*. That Giancoli was a solitary obstacle to a verdict could not have eluded the court.[3]

---

[3] The judge's statements to Giancoli further indicate he was well aware that Giancoli's presence on the jury was preventing a unanimous verdict: "I understand this is not the happiest of circumstances. There's no hung or almost hung jury that's a happy jury . . . Having been in this business for a number of years, [I] can tell from the look on the juriors' faces whether they're having difficulty or not, and so I don't envy you the service that you have rendered. I know it has been difficult." (ER 214).

The Ninth Circuit's tardy attempt to distinguish *Tabacca* is unconvincing. The court cursorily justified its deviation from its own precedent by declaring that the issues in the present case were "more complicated than those in *Tabacca*, increasing the risk that further disruption of the deliberations process would dull the jurors' memories and concentration." Slip op. at 8415. That justification is unpersuasive, given the brevity of the trial, the relatively straightforward issues presented, and the gravity of the constitutional right to a unanimous verdict. The Ninth Circuit's brief discussion justifying the removal as an exercise of the trial court's discretion to "control its docket," *id.*, improperly elevates court administrative considerations over defendants' constitutional and federal statutory rights.

Removal of a juror during deliberations "jeopardizes the right to a unanimous verdict." *Essex*, 734 F.2d at 840. Unanimity is essential to the proper functioning of the jury system. *Id.* at 841. As the Ninth Circuit itself has eloquently stated

> A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of pury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. *United States v. Lopez*, 581 U.S. 1338, 1341 (9th Cir. 1978).

Removing a holdout juror creates the "danger that dissenting views may not be heard, debated, and resolved by the process of arriving at a unanimous verdict," *Essex*, 734 F.2d at 841. Those judicial observations have been corroborated empirically. Studies have shown that the deliberative process is fundamentally different when the rule of decision is changed from unanimity to majority.[4]

---

[4] See Hastie, Penrod, and Pennington, *Inside the Jury* (1987); Charlan Nemeth, *Interactions between Jurors as a Function of Majority v. Unanimity Decision Rules*, 7 *Journal of Applied Social Psychology*, 38-56.

Juries operating under a majority decision rule are less concerned with testing the justifiability of their views and defending them against minority viewpoints.[5] One study determined that majority-rule juries do not reach consensus unless required to, decisions are reached as soon as a sufficient majority is obtained, regardless of whether the minority is still viably arguing for a contrary result, deliberations are shorter and debate is less robust than when unanimity is required.[6] Other studies also have concluded that deliberations in majority-rule juries are shorter, and have found that there is less effort by jurors to correct factual inaccuracies espoused by other jurors, and less detailed discussion.[7] It is relevant in that regard that, in the instant case, once Giancoli was removed, the previously deadlocked jury returned a verdict in less than an hour. Unsurprisingly, juries under a majority decision rule are less likely to hang.[8] To the detriment of the adjudicatory process, non-unanimous juries also are more likely to commit errors of law.[9]

The holdout juror plays a special role in the jury's search for justice. Studies have shown that a holdout juror's rate of interaction with other jurors and the vehemence of his advocacy are inversely proportional to the size of the minority to which he belongs.[10] A holdout juror may fight hardest and most effectively when he is alone. His opinion deepens the jury's examination of the issues before it and promotes correct application of the governing law. Those features of jury deliberations are critical to a just adjudication of disputes. It will never be known what would have happened had Giancoli been allowed to return to the jury, even if just for the remaining

---

[5] Nemeth at 54-55.

[6] *Id.*

[7] Hastie at 228.

[8] *Id.*

[9] Hastie, et al. at 228-29.

[10] Charles Hawkins, *Interaction Rates of Jurors Aligned in Factions*, 27 *American Sociological Review* 689-91 (1962).

hour before he had to leave for his board meeting. Alone and under time constraints, he may have developed a pivotally persuasive argument and shifted the direction of the jury's reasoning.

Given the significant difference one juror can make in jury deliberations, it is critical that the admonition in the commentary to F.R.C.P. 47(c), that refusal to agree to a verdict does not constitute just cause for removal, be rigorously observed. To allow a judge, on pretext of controlling his docket, to remove a juror without regard to the unanimity requirement drastically undermines the effectiveness and validity of the jury process.

As Justice O'Connor has observed:

> Our abiding faith in the jury system is founded on long-standing tradition reflected in the constitutional text, see U.S. Const Art III, § 2, Amdts 6, 7, and is supported by sound considerations of justice and democratic theory. The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values.

*TXO*, 125 L.Ed.2d at 389 (O'Connor dissenting). If citizens are to continue to put their faith in the jury system which has served so well for more than two centuries, they must be able to depend on reviewing courts to ensure that juries are not manipulated by trial judges for mere administrative purposes, such as "controlling the docket." Allowing the lower courts' decisions in this case to stand renders the constitutional right to a unanimous verdict illusory and grants trial courts excessive discretion to remove jurors in order to hasten deliberations. Such a denigration of the hallmark of American jurisprudence should not be permitted.

## II. THE JURY'S IMPOSITION OF PUNITIVE DAMAGES AMOUNTING TO NEARLY 800 TIMES THE COMPENSATORY DAMAGE AWARD AND THE CURSORY REVIEW OF THAT AWARD BY THE TRIAL COURT AND COURT OF APPEALS VIOLATED PETITIONERS' RIGHT TO SUBSTANTIVE DUE PROCESS UNDER THE FIFTH AMENDMENT AND CONTRAVENED THIS COURT'S ENUNCIATION OF THE NATIONAL LABOR POLICY AGAINST WEAKENING UNIONS AND PENALIZING DUES-CONTRIBUTING MEMBERS FOR ALLEGED UNION MISCONDUCT.

The Ninth Circuit's summary affirmance of the trial court's equally insubstantial review of the jury's imposition of a grossly excessive punitive damage award violated Petitioners' right to due process. The right to appellate review of punitive damage awards is an empty one if the reviewing court does not engage in a meaningful substantive analysis. Neither the district court in this case nor the Ninth Circuit articulated an adequate justification for upholding the jury's award of damages amounting to nearly 800 times the nominal actual award imposed. The mere invocation of case law and a ritual of judicial blessing cannot satisfy the constitutional right to due process. The Constitution surely confers a right to more than such a charade.

This Court's pronouncements regarding the due process limitations on punitive damages have left the federal courts in a state of conflict and uncertainty. Not only is it unclear what minimum procedures are constitutionally required in order to adequately ensure that punitive damage awards are rationally imposed, but it is also unsettled among the courts whether the Due Process Clause only confers a bare procedural right to review, or also a substantive right to a correct determination of whether a punitive damage award is reasonable. The unusual features of this case present an opportunity for the court to resolve those conflicts and rule definitively that in order for the procedural right to judicial review to have meaning, the review standards must be substantively defensible.

The award of exemplary damages is an exercise of state power and must comply with the Due Process Clauses of the Fifth and Fourteenth Amendments. *Honda Motor Co. v. Oberg*, 512 U.S. ——, 129 L.Ed.2d 336, 351 (1994). This Court has stated that punitive damages must be no greater than necessary to effectuate the goals of punishment and deterrence. *Haslip*, 499 U.S. at 21. Excessive punitive damage awards violate the right to due process. *Oberg*, 129 L.Ed.2d 336, 342 (1994); *TXO*, 509 U.S. ——, 125 L.Ed.2d 379 (1993); *Haslip*, 499 U.S. at 18-20 (1991).

It appears to be settled that the Due Process Clause confers a right to judicial review of punitive damages for reasonableness. See *Oberg*; *TXO*, 125 L.Ed.2d at 387 (Scalia concurring); *id.* at 393 (O'Connor dissenting). However, the opinions of this Court have been split over whether there is also a substantive due process right to a correct determination of reasonableness. The plurality in *TXO* and the majority in *Haslip* both passed judgment not only on whether the procedures were adequate but, also, on whether application of those procedures below resulted in awards that were so excessive as to violate due process. *Haslip*, 499 U.S. at 23 ("while the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety."); *TXO*, 125 L.Ed.2d at 382 ("the punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow" footnote omitted.)

However, Justice Scalia, concurring in the judgment in *TXO*, joined by Justice Thomas, stated clearly his belief that the Due Process Clause confers no substantive

right to a correct determination of reasonableness but, rather, only a procedural right to review: "To say (as I do) that 'procedural due process' requires judicial review of punitive damages awards for reasonableness is not to say that there is a federal constitutional right to a substantively correct "reasonableness" determination . . . *judicial* assessment of their reasonableness is a federal right, but a *correct* assessment of their reasonableness is not." *TXO*, 125 L.Ed.2d at 388-389 (emphasis in original).

In her dissent, Justice O'Connor expressed a contrary position, arguing that appellate courts must not only scrutinize the procedures used by the trial court, but also the size of the award in light of the policies promoted by the imposition of exemplary damages. *TXO*, 125 L.Ed.2d at 389-393 (O'Connor dissenting).

In *Oberg*, a majority of the court joined an opinion stating that "our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damage awards." 129 L.Ed.2d at 342. Justice Ginsberg, however, joined by Chief Justice Rehnquist, writing in dissent, stated "a judgment that is a product of fair procedures . . . is entitled to a strong presumption of validity" which "should be irrebuttable or virtually so." 129 L.Ed.2d at 353, quoting *TXO*, 125 L.Ed.2d 366.

That split of opinion on the Court, regarding whether the Due Process Clause only imposes limits on the procedures that may be employed in assessing punitive damages or also imposes a substantive limit on the size of such awards, has left the lower courts uncertain how to proceed. A careful examination of the cases indicates that, while many of the courts that have addressed the issue carefully refrain from taking a position on whether litigants have a substantive right to a correct determination of reasonableness, they invariably engage in a substantive review of punitive damages awards, looking to *Haslip* and *TXO* for the applicable guidelines.[11]

---

[11] See, e.g., *Dunn v. Hovic*, 1 F.3d 1371 (3d Cir. 1993) ("We may take from *Haslip*, therefore, that a punitive award that is

Neither *Haslip* nor *TXO* specified what factors a court must consider when determining if an award of punitive damages is reasonable. The procedures upheld in those cases apparently are not constitutionally mandated, but they provide some insight into what factors are relevant and constitutionally permissible to consider regarding whether an award is reasonable. A look at the policies advanced by those procedures makes apparent that the trial court's and Ninth Circuit's review of the jury's verdict in this case were woefully constitutionally inadequate.

*Haslip*, *TXO*, and *Oberg* indicate that, at a minimum, due process requires appellate review of punitive damages awards. In *Haslip*, the Court upheld the Alabama process for the imposition of punitive damages, specifically approving the court's application of the following considerations when reviewing punitive damages awards:

> (a) Whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct,

---

greater than reasonably necessary to punish and deter violates substantive due process." The court found that interpretation to be corroborated by the fact that in *TXO*, "the plurality opinion relied on a general concern of reasonableness."); *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 128 L.Ed.2d 677 (1994) (noting split of opinion in *TXO*, but resting its opinion on the compliance of Arkansas procedures with principles from *Haslip* and noting that the trial court made specific factual findings to justify punitive damages award); *Klein v. Grynberg*, 44 F.3d 1497 (10th Cir. 1995) (finding that *TXO* applies a general standard of "reasonableness" to review of punitive damages awards and mandates application of the factors considered by the *TXO* Court to justify the punitive damages award in that case.); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991) (identifying both a substantive and procedural inquiry in *Haslip* and stating, "Under *Haslip*, an award of punitive damages does not meet constitutional requirements unless the circumstances of the case indicate that the award is reasonable.") *Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991) (remanding for reconsideration in light of *Haslip* factors).

> the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

*Haslip*, 499 U.S. at 22.

In *TXO*, a plurality on this Court approved of somewhat less rigorous factors applied on appeal by the Virginia Supreme Court: "(1) The potential harm that TXOs' actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future." *TXO* at 376. The plurality in *TXO*, like the majority in *Haslip*, refrained from enshrining the particular criteria employed as constitutionally required, but the Court found that the procedures applied by the Virginia Supreme Court were sufficient to satisfy the Court's "general concern of reasonableness." *Id.* at 379.

The plurality engaged in a substantive analysis, however, applying the principles enunciated by the Virginia court, and upheld the punitive damage award in light of "the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit and petitioner's wealth." 125 L.Ed.2d at 382.

Unlike the courts in either *Haslip* or *TXO*, the Ninth Circuit in the instant case articulated absolutely no criteria by which it reviewed the punitive damage award against Petitioners for reasonableness. This Court's holding that a "general concern for reasonableness" must drive the appellate court's analysis surely requires more than a mere conclusory blessing by an appellate court

panel. The Ninth Circuit failed to explain its understanding of what facts supported an award of punitive damages, what constituted a violation of respondent's free speech rights, why that violation was "serious," and why due process is not offended by a punitive damage that is nearly 800 times the actual damages awarded by the jury.

The District Court's cursory justification for upholding the award, that speech violations are "hard to put a price tax on," is specious, at best. The jury did put a price on the injury it believed the plaintiffs suffered: $100.00, apparently finding the plaintiff did not suffer serious damages as a result of any infringement on his rights.[12]

Moreover, if this Court were to agree that speech rights violations are incapable of monetary measurement, then it is impossible to assess whether the punitive damages award is rationally related to the harm actually or potentially suffered. The plurality in *TXO* concluded that a court may consider not only actual but potential harm caused by a defendant's conduct when reviewing punitive damage awards for reasonableness. 125 L.Ed.2d at 380-81. However, if the alleged violation cannot, due to its nature, be measured monetarily, then any assessment of the proportionality of punitive damages to actual harm, whether already incurred or potential, must, of necessity, be utterly arbitrary. It is against such an arbitrary deprivation of property that the due process clause is directed. *TXO*, 125 L.Ed.2d at 388 (Scalia concurring), *id.* at 380-82 (plurality opinion). Upholding the punitive damages award in this case on such paltry review exacerbates the danger inherent in a system that allows juries to impose punitive damages: that passion or prejudice rather than legitimate concerns

---

[12] Taking into consideration inflation and the tremendous increase in wages and the cost of living since the birth of this nation, one may safely characterize an award of $100.00 compensatory damages as equivalent to the award of $1.00 nominal damages at common law. Such an award acknowledges that a plaintiff's rights were, technically, violated, but also sends the message that the actual harm suffered was so small as to be non-compensable.

of punishment for, and deterrence of, culpable conduct will drive the jury.

This Court has previously held that punitive damage awards against unions for duty of fair representation violations flout national labor policy. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979). Although such awards might encourage unions to process individual grievances, the court reasoned, the potential benefits were offset by the possibility that "punitive awards could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area." *Id.* at 48. Damages in the DFR context are designed "to make the injured employee whole." *Id.* Prohibiting punitive damages in such cases preserves the "careful accommodation" between individual and collective rights by affording "individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds." *Id.* at 50.

The Court's concerns in the DFR context are equally applicable to claims under § 102 of the LMRDA. Punitive damage awards for alleged violations by the union could "deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have." *Id.* at 50-51.

As in the DFR context, the goal of a damages award in the context of an alleged violation of individual members' free speech rights should be to make the aggrieved party whole. The jury in this case determined that $100.00 would serve that purpose. The punitive damage award is excessive and violates the principles guiding this Court in *Foust*. Moreover, this Court invalidated a punitive damage award when it was imposed for conduct that the defendant reasonably believed was required of it by law. See *Southwestern Telegraph and Telephone Co. v. Danaher*, 238 U.S. 483, 489 (1914). Similarly, in this

case the Union reasonably believed it was prohibited from dispatching Murray under the circumstances.

It is significant that the LMRDA does not even contain a provision authorizing punitive damages for § 102 claims. There is no principled reason to distinguish *Foust* in this context. As with DFR violations, a party whose free speech rights have been violated (which Petitioners maintain Respondent's were not) must be made whole. However, as in the DFR context, that individual's interests must be balanced against the interests of other dues paying members in having a strong representative. To impose punitive damages for the claimed violations of respondent's free speech rights, especially in such gross disproportion to actual damages, would subvert the interests of the other members of the union to the respondent's desire to punish the union for a minor infringement on his rights. Such an award violates the national labor policy articulated in *Foust*.

The implication of national labor policy in this case underscores the necessity of requiring a meaningful substantive review of punitive damage awards on appeal. The Ninth circuit made no effort to justify upholding the punitive damage award in this case in the face of that policy. It is not enough to grind a case through the appellate docket and issue a judgment. To satisfy due process, courts must, at a minimum, assess the nature and degree of the harm caused or potentially caused, the proportionality of the punitive award to that harm, and examine whether the punitive damage award is reasonably calculated to punish and deter the perpetrator. Moreover, a court must assess whether other relevant national policy is contravened by the imposition of a punitive damage award.

Finally, as discussed more fully below, to allow a punitive damage award in this case where such awards are not allowed for duty of fair representation violations will encourage unions to commit DFR violations, precisely to avoid the risk of substantial liability by those claiming dissident status. Such a result directly contravenes the

mandate implicit in the establishment of exclusivity of representation in NLRA Sec. 9(a). See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Encouraging DFR violations in that way will upset the "careful accommodation" sought to be preserved by *Foust* at least as severely as imposing punitive damage awards for DFR violations would have. That result is intolerable and makes a mockery of the Court's reasoning in *Foust*.

## III. THE NINTH CIRCUIT HAS CREATED AN IRRECONCILABLE CONFLICT OF STATUTORY DUTIES FOR PETITIONER AND OTHER UNIONS BY AFFIRMING THE SUBMISSION TO THE JURY FOR CONSIDERATION AS AN LMRDA VIOLATION CONDUCT THAT WAS REQUIRED OF THE UNION BY THE NATIONAL LABOR RELATIONS ACT IN ORDER TO AVOID VIOLATING THE DUTY OF FAIR REPRESENTATION OWED TO OTHER UNION MEMBERS.

The trial court in this case sent the claims that the Union and Durran, Jr. violated respondents free speech rights under LMRDA § 101(a)(1) and (2) to the jury, despite having found that the failure to refer was not a duty of fair representation violation and did not constitute discipline under LMRDA §§ 101(a)(5) and 609. The jury's punitive damages award against Durran, Jr. in the amount of $10,000 rests entirely on a finding of liability under that theory.

The complaint alleged that Durran, Jr. assaulted Respondent at the membership meeting and that he received a call that an employer wanted to hire Respondent, but failed to notify him. Plaintiff's counsel at trial also argued that the failure to refer was a DFR violation and constituted discipline without due process and in retaliation for protected activity in violation of LMRDA §§ 101(a)(5) and 609.

The court granted judgment as a matter of law for Petitioners on several issues, including the DFR, finding that the union had no duty to inform respondent of the referral letter. (ER 170). The court also ruled that the

failure to refer was not discipline within the meaning of the LMRDA. (ER 170-74) The jury determined that Durran, Jr. did not assault Murray. (Jury Verdict, reprinted at App. C, p. 23a, *infra*). Accordingly, the only basis for imposing liability and punitive damages on Durran, Jr. was under the theory that he participated in the failure to refer Respondent to the employer through the hiring hall and that failure infringed on Respondent's § 101(a)(1) and (2) rights, in violation of § 102.

In *Breininger v. Sheet Metal Workers Int'l Assn., Local Union No. 6*, 493 U.S. 67 (1989), this Court held that "by using the phrase 'otherwise discipline' Congress did not intend to include all acts that deterred the exercise of rights protected under the LMRDA, but rather meant instead to denote only punishment authorized by the Union as a collective entity to enforce its rules." *Id.* at 91. Consequently, a failure to refer through the hiring hall allegedly in rataliation for political opposition to union leadership was held not to provide a basis for an LMRDA claim under §§ 101(a)(5) or 609. This Court explicitly refrained from ruling on whether such a failure to refer could state a claim under § 102. *Id.* at 94, n.18.

Regardless of whether, in the abstract, a failure to refer could support such a claim, it could not do so in cases where, as here, referral is *prohibited* by the parties' collective bargaining agreement. Protecting the free speech rights of union members is unquestionably of paramount importance, but the LMRDA must not be interpreted to allow union members to circumvent the collective bargaining agreement and force the union to violate the NLRA merely by claiming that they are "dissidents."

A union must comply with the provisions of its hiring hall agreement. If it fails to do so, it violates the NLRA. *Breininger*, 493 U.S. at 76, n.3 ("Deviation from clear and unambiguous standards in refusing to refer an employee for work establishes a prima facie violation of § 8(b)(1)(A) and 8(b)(2) of the NLRA); *NLRB v. Iron Workers Local 75*, 583 F.2d 1094 (9th Cir. 1978). In this case, an arbitrator determined that the hiring hall

provisions of the collective bargaining agreement prohibited the Union from issuing the job dispatch to Respondent under the circumstances presented in this case. See McKay Arbitration Award, reprinted at App. K., p. 46a, *infra*. The arbitrator reasoned that if the union had given respondent the special treatment he demanded, the union would have breached its duty to fairly represent other unit members who were in the hiring hall when the work became available and who were actually entitled to the job dispatch while Respondent was not. *Id.*

Significantly, Respondent was represented by legal counsel at that aribitration hearing and never sought to vacate the award. Accordingly, the award is final and binding. As such, it became part of the terms of the collective bargaining agreement. See *United Paperworkers v. Misco*, 484 U.S. 29, 38 (1987) ("[I]t must be remembered, that grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining. It is through these processes that the supplementary rules of the plant are established"). Not only the parties to the CBA, but the district court and jury were bound by that ruling. *Id.* at 37-38.

National labor policy, as expressed in the Labor Management Relations Act of 1947, 29 U.S.C. § 173(d), favors the "private settlement of disutes without the intervention of government." *Misco*, 484 U.S. at 37. Pursuant to that policy, this Court has noted that "because the parties have contracted to have disputes settled by an aribtrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *Id.* at 37-38. This Court continued:

> [A]n arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract; . . . the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the

> contract . . . So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined.

*Id.* at 38 (citations omitted). Thus, the District Court was bound by Arbitrator McKay's determination that the Union was prohibited from dispatching respondent under the circumstances of his absence from the hiring hall. To allow the court to send the referral issue to the jury as a possible LMRDA violation, in effect, allows the court to vacate the arbitrator's award, which it lacked authority to do.

In addition, the District Court's decision to send the referral issue to the jury conflicts with its rulings on Petitioners' F.R.C.P. 50 Motions. Both the trial court and the Ninth Circuit agreed that the union had no duty to notify respondent of the letter. Nevertheless, the trial court sent the failure to refer to the jury as a potential LMRDA § 102 violation. In response to counsel's argument on appeal that the failure to refer could not support a § 102 claim, the Ninth Circuit remarked only "possibly so," but neither analyzed nor passed judgment on the issue. *Murray*, slip op. at 8416.[13]

---

[13] The Ninth Circuit attempted to justify its affirmance of the jury's verdict by asserting that the finding of liability for a § 102 violation was supported by other evidence, relating to attempted confiscation of the newsletter, use of Respondent's prepaid dues to collect the costs assessed against him in arbitration, and conduct during the membership meeting. However, it was amply demonstrated that Respondent's distribution of literature interfered with union business and the union was within its rights under the LMRDA and the collective bargaining agreement when it restricted distribution of literature inside the hiring hall during hiring hall hours. The District Court found and the Ninth Circuit affirmed that the Union's use of respondent's dues to collect costs previously assessed was permissible and did not violate rsepondent's rights, and the conduct at the meeting was an exercise of administrative authority properly wielded under the governing rules of

In *NLRB v. Iron Workers, supra,* the Ninth Circuit held that if a union has complied with its written hiring hall provisions, the union's motive for doing so is irrelevant and may not be inquired into. Since the union's motive for following its own procedures is the only possible basis for respondent's LMRDA claim, at least against Durran, Jr., the judge erred by submitting the issue to the jury.

If the Union had dispatched Respondent despite his absence from the hiring hall, it would have committed a DFR violation under the NLRA. If the trial court's submission of the union's compliance with its hiring hall provisions to the jury is upheld, the union will be punished under the LMRDA for refusing to violate its duty of fair representation under the NLRA. As this court has previously explained

> When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature.

*Kokoszka v. Belford,* 417 U.S. 642, 650 (1974) (citations omitted). Thus, the LMRDA must be applied in harmony with the rest of the NLRA.

The jury's verdict in this case places the union in the untenable position of having to choose between which of two federal statutes to violate in the future. This Court has held that punitive damages may not be imposed on a union for violating the duty of fair representation. *Foust,* 42 U.S. at 50-51 (see discussion *supra*). As a result, from a pure risk-aversion standpoint, the union may be virtually forced to breach its duty of fair representation

---

order. Finally, the jury found that Murray, not Durran, Jr., was the aggressor in the altercation that occurred at the union meeting. Thus, there was no other basis in the record to support the jury's verdict.

to the members as a whole simply to avoid ruinous punitive damage awards by members who demand special and contractually-prohibited rights to job referrals merely because they claim to be dissidents. It is inconceivable that when Congress enacted two federal statutes (the NLRA and LMRDA) to govern the same conduct of unions, it would have done so knowing or even anticipating that compliance with one could lead to ruinous punitive damage awards for the alleged violation of the other. Such a result not only surely flouts Congressional intent, but also violates fundamental tenets of statutory construction embraced by this Court.[14]

Thus, the verdict in this case should be set aside in order to ensure consistent application of the federal labor statutes and remain true to this Court's decision in *Foust*.

## CONCLUSION

For all the foregoing reasons, Petitioners submit that a Writ of Certiorari should issue.

Respectfully submitted,

SANDRA RAE BENSON
*Counsel of Record*
VICTOR J. VAN BOURG
VAN BOURG, WEINBERG, ROGER & ROSENFELD
A Professional Corporation
180 Grand Avenue, Suite 1400
Oakland, California 94612
(510) 839-6600

---

[14] See *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) ("where possible, provisions of a statute should be read so as not to create a conflict"); *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) ("in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provision of the whole law and to its object and policy"); *Achilli v. United States*, 353 U.S. 373, 379 (1957) ("[o]ur duty is to give coherence to what Congress has done within the bounds imposed by a fair reading of legislation").